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6

UNITED STATES DISTRICT COURT
 7 DISTRICT OF ARIZONA

8 James A. Payne, an individual,

9 Plaintiff,

No. 2:09-cv-01195-NVW

10 v.
 11 Joseph Arpaio, Maricopa County Sheriff, et
 al.,

12 Defendants.

**DEFENDANTS MARICOPA
 COUNTY SHERIFF'S OFFICE AND
 ARPAIO'S REPLY
 MEMORANDUM IN SUPPORT OF
 MOTION FOR JUDGMENT ON
 THE PLEADINGS**

13 This Court should grant Defendants Arapio and the Maricopa County Sheriff's
 14 Office ("MCSO") judgment on the pleadings because the undisputed facts, as established
 15 by Plaintiff, demonstrate all his claims accrued, *at the latest*, in 2004. His state law claims
 16 are barred not only because they are untimely, but also because Plaintiff did not timely file
 17 a notice of claim. For these reasons, and those set forth in the original Motion, Plaintiff's
 18 claims against these Defendants should be dismissed.

19 **I. THERE IS NO ISSUE OF FACT PRECLUDING A FINDING THAT PLAINTIFF'S § 1983
 20 AND COMMON LAW NEGLIGENCE CLAIMS ARE TIME-BARRED.**

21 Defendants' Motion for Judgment on the Pleadings ultimately can be reduced to
 22 determining when Plaintiff's claims accrued. A claim under § 1983 accrues when the
 23 plaintiff knows, or has reason to know, of the injury that is the basis of his action and the
 24 cause of the injury. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 379 (9th Cir. 1998);
 25 *see also Dyniewicz v. U.S.*, 742 F.2d 484, 486-87 (9th Cir. 1984) (the "cause" of an injury
 26 is the "immediate physical cause"). Taking all of the allegations in Plaintiff's Complaint
 27 as true, and viewing those allegations in connection with the materials Defendants
 28

1 properly introduced in connection with their original Motion,¹ it is indisputable that
 2 Plaintiff knew of his injury and its physical cause no later than July of 2004. Despite
 3 Plaintiff's contention to the contrary, there is no issue of fact² precluding this Court from
 4 entering judgment in this case.³

5 Before he was incarcerated by the County, Plaintiff says "he successfully managed
 6 and controlled his chronic disease [diabetes] ..." and "led a life relatively free from
 7 diabetic complications" (Doc. #1 at ¶ 19, Exh. 1 at 3); (Doc. # 54 at 1). But this all
 8 began to change in April of 2001, when he was arrested and put in the Durango Jail, a
 9 Maricopa County jail facility. (Doc. #1, Exh. 1 at 3). Almost immediately, Plaintiff says
 10 his medical needs went unmet, or were intentionally disregarded. And the evidence
 11 shows that Plaintiff began addressing the perceived inadequacies in treatment at least as
 12 early as 2003.⁴

13 ¹ Defendants properly submitted materials pursuant to exceptions to the
 conversion rule. Plaintiff, however, has improperly included materials with his Response,
 14 including certain VA medical records from August – September of 2008, as well as a copy
 15 of Maricopa County's Notice of Claim Form. (Doc. #54-1). These materials were not
 16 referred to in the Complaint or Plaintiff's notice of claim, nor does the Complaint or
 17 notice of claim rely on the exhibits Plaintiff has attached to his Response. Plaintiff offers
 18 no legal authority providing he can attach them in a response to a motion for judgment on
 19 the pleadings and, as such, these documents were submitted in violation of the conversion
 20 rule and Defendants move to strike them.

21 ² The cases Plaintiff cites in support of his contention that accrual is always a fact
 issue are either unavailing, or plainly inapplicable. *See, e.g., McSherry v. City of Long
 Beach*, 423 F.3d 1015, 1020-21 (9th Cir. 2005) (court held judgment improperly granted
 22 under Rule 50(a), where defendant moved for judgment before plaintiff had concluded
 23 presentation of evidence because Rule required that plaintiff's evidence be "fully heard"
 24 before judgment could be granted); *see also Honey v. Distelrath*, 195 F.3d 531, 533 (9th
 25 Cir. 1999) (dealing only with claim preclusion, not accrual).

26 ³ A motion for judgment on the pleadings under Rule 12(c) should be granted
 where there is no issue of material fact on the face of the pleadings. *Hal Roach Studios,
 Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). This is not the
 27 same as saying accrual is always an issue of fact precluding a court from granting a
 28 motion for judgment on the pleadings where accrual is an issue.

29 ⁴ While Plaintiff's Complaint relates only to incarceration in County facilities in
 2001-02, all the records he relies on in his Complaint and his notice of claim letter involve
 30 incarceration in County jails in 2003-04. Upon information and belief, all of the records
 31 that may have existed for Plaintiff's incarceration in 2001-02 have been destroyed
 32 pursuant to relevant document retention policies. Thus, while Defendants believe it is
 33 highly likely those documents would show Plaintiff complaining of the lack of treatment
 34 and may also have shown Plaintiff's awareness of his injury earlier than 2004, the only
 35 records available are from 2003-04 and therefore Defendant relies on those here.

1 By May 16, 2004, Plaintiff demonstrated he was aware of the likely consequences
 2 of Defendants' failure to adequately treat his diabetes. According to a grievance filed on
 3 this date, Plaintiff suffered a hypoglycemic episode, resulting in slurred or mumbled
 4 speech, but Defendants did not properly respond with appropriate treatment. (Doc. #1,
 5 Exh. 1 at 5). Plaintiff's proposed resolution to this failure to treat was to better train
 6 officers to properly handle diabetic emergencies to "prevent irreversible complications or
 7 even death." (Doc. #42 , Exh. 2). Plaintiff later suggested that detention officers be
 8 trained according to the American Diabetes Association's regulations for providing
 9 diabetic care in correctional facilities (*Id.*, Exh. 3), which expressly state that a "hiatus in
 10 either medication or appropriate nutrition may lead to either severe hypo- or
 11 hyperglycemia that can *rapidly progress to irreversible complications*, even death." (Doc.
 12 #1, Exh. 1 at 6). Given his reference to and reliance on the Association's materials in
 13 May of 2004, Plaintiff plainly knew of the likelihood of complications that he might (and
 14 allegedly did) suffer as a result of failure to treat his pre-existing diabetes.⁵

15 The question thus becomes at what point Plaintiff became aware of his actual
 16 injury. His "injury" was the deterioration and development of his diabetes into a worse
 17 condition. The Complaint makes this abundantly clear, stating that Defendants' failure to
 18 treat Plaintiff's diabetes "exacerbated his chronic disease" and "has caused irreparable
 19 deterioration" of his condition. (Doc. #1 at ¶¶ 37, 80). In their original Motion,
 20 Defendants discussed that Plaintiff's condition began to demonstrably deteriorate at least
 21 as of 2004, and arguably before. (Doc. #42 at 3-6). Per his notice of claim, he began
 22 suffering comas due to vacillations in his blood sugar upon incarceration in 2001; by
 23 2004, he had suffered a significant deterioration of his eyesight, and the loss of use of at
 24 least one hand (perhaps due to nerve damage). In fact, by the summer of 2004, his

25 ⁵ Plaintiff's management of his diabetes prior to incarceration of 2001 was so
 26 successful, he claims, that he experienced virtually no complications of the disease. This
 27 suggests that Plaintiff was keenly aware that the failure to properly treat his condition
 28 would result in complication and that he had a heightened sense of awareness likely
 leading him to more quickly recognize the onset of complications of diabetes and the
 symptoms that indicated a deterioration or worsening of his condition.

1 condition had deteriorated so much, Plaintiff told the criminal judge tasked with
 2 sentencing him that he “may not have long to live.”

3 While the parties may dispute which specific complications constitute recognizable
 4 consequences of the alleged failure to treat, the fact remains that the above-cited
 5 complications were indicative of a worsening of condition of which Plaintiff was well-
 6 aware no later than July 7, 2004.⁶ Any § 1983 claim he wished to bring on such an injury
 7 had to be filed within two years, or no later than July 6, 2007. Plaintiff did not meet this
 8 deadline and his § 1983 claims are now barred.

9 **A. There is no reason for the Court to apply *Augustine* to this case.**

10 Plaintiff urges this Court to apply the accrual standard announced in *Augustine v.*
 11 *United States*, 704 F.2d 1074 (9th Cir. 1983) to this case. There is no reason to do so. In
 12 *Augustine* and the cases following its approach, the plaintiff neither knew of the
 13 wrongdoing forming the basis of his claim, nor had a reason to suspect that anything was
 14 wrong. *Augustine*, 704 F.2d at 1076 (treating physician failed to diagnose a bump in
 15 plaintiff’s mouth as cancerous); *see also Bibeau v. Pacific Northwest Research*
 16 *Foundation, Inc.*, 188 F.3d 1105 (9th Cir. 1998) (plaintiff’s conspiracy claim did not
 17 accrue until he had reason to believe symptoms he was suffering were tied to radiation
 18 experiment and until he knew he was fraudulently induced to participate in that
 19 experiment). By contrast, in this case, Plaintiff not only suspected wrongdoing, he knew of
 20 it, as demonstrated by his frequent complaints (official and unofficial) regarding the
 21 failure to treat and the putative consequences thereof, and in his legal papers⁷ submitted in

22 ⁶ Plaintiff cannot now legitimately contend that he was unaware these
 23 complications were related to the failure to treat his diabetes when his grievances are
 24 replete with warnings of the likely consequences of that alleged inadequacy in handling
 25 his diabetic needs.

26 ⁷ Plaintiff seeks to minimize the facts established in the sentencing memorandum
 27 of July 2004 (Doc. #42, Exh. 5), referring to the statements of his criminal defense
 28 attorney, friend and ex-wife as nothing more than “speculative third party statements.”
 (Doc. #54 at 7). This evidence cannot be so casually disregarded. In making
 representations to the court, Plaintiff’s attorney was acting as his agent, and therefore the
 attorney’s statements are the functional equivalent of Plaintiff’s own words. Further, at
 the time she submitted a letter regarding Plaintiff’s worsening medical condition,
 Plaintiff’s ex-wife was living with Plaintiff; for Plaintiff to attempt to brush off Ms.
 Payne’s comments as speculation defies logic.

1 his criminal action in 2004 detailing the development of many of the very complications
 2 which now form the basis of his claim related to the deterioration of his diabetic
 3 condition.

4 The standard applicable to this case is therefore the same as that announced in
 5 *United States v. Kubrik*, 444 U.S. 111, 122 (1979) and cases following that decision, like
 6 *Davis v. United States*, 642 F.2d 328, 330 (9th Cir. 1981), which hold a claim accrues at
 7 the time of injury. In both *Kubrik* and *Davis*, the court refused to toll the statute of
 8 limitations where the plaintiff knew of his injury and the cause (deafness resulting from
 9 the improper use of neomycin to treat a wound and paralysis resulting from polio
 10 inoculation, respectively).⁸ The court likewise expressly rejected the plaintiffs' request to
 11 toll the statue until such time as the plaintiff knew or had reason to suspect some
 12 negligence,⁹ noting that once a plaintiff knows of an injury and its cause, he is on the
 13 same footing as any other tort plaintiff and thus has the obligation to investigate and
 14 determine if a claim should be filed. *Davis*, 642 F.3d at 331; *see also Davis v. Yageo*
 15 *Corp.*, 481 F.3d 661, 673-74 (referring to California law and noting a claim accrues with
 16 "the infliction of appreciable and actual harm, however uncertain in amount") (citation
 17 omitted).

18 The same is true in this case. There is no question that Plaintiff knew of his injury
 19 and believed Defendants' failure to treat was the cause. There is no basis, therefore, for
 20 the Court to toll the statute until 2008, which is when Plaintiff alleges he became aware of
 21 the extent of his damages (i.e. the deterioration of his condition) and began to suspect
 22 Defendants were responsible for them. *Herrera-Diaz v. Dep't of the Navy*, 845 F.2d
 23 1534, 1537 (9th Cir. 1988) (where the plaintiff has reason to and does, in fact, suspect that

24 ⁸ *Kubrick* is equally applicable to cases in which an omission is the cause of injury,
 25 such as the failure to treat a condition, as Plaintiff alleges. *See Sexton v. U.S.*, 832 F.2d
 26 629, 634 (D.C. Cir. 1987).

27 ⁹ Plaintiff suggests he did not know of Defendants' negligence and the role it
 28 played in causing his injuries. *Kubrick* explicitly rejects the very argument Plaintiff
 advances here – that accrual is tolled until the claimant knows, or has reason to know, that
 there was negligence. *Kubrick*, 444 U.S. at 122.

1 particular act or omission is problematic, that is sufficient for the claim to accrue).

2 **B. Even if this Court applies *Augustine* in determining when Plaintiff's**
claim accrued, Defendants are nevertheless entitled to dismissal.

3 Even if this Court applies the *Augustine* accrual standard, however, it is clear that
4 Plaintiff's claims are untimely and should be dismissed. *Augustine* involved a medical
5 malpractice claim regarding the failure to diagnose and treat brought pursuant to the
6 Federal Tort Claims Act ("FTCA"). *Augustine*, 704 F.2d at 1075. The claim in *Augustine*
7 arose from the failure of a military dentist and oral surgeon to properly diagnose (and
8 therefore treat) a cancerous bump in the plaintiff's mouth. Noting that the identification
9 of an injury and/or its cause in a failure to diagnose/treat claim *may* be (but was not
10 always) more difficult, especially where the claimant had a pre-existing condition, the
11 court held the "injury is the *development* of the problem into a more serious condition
12 which poses greater danger to the patient or which requires more extensive treatment.". *Id.* at 1078 (emphasis in original). Thus, "it is only when the patient becomes aware or
13 through the exercise of reasonable diligence should have become aware of the
14 development of a pre-existing problem *into a more serious condition* that his cause of
15 action can be said to have accrued" *Id.* (Emphasis added).

16 At least as early as 2004, and likely earlier, Plaintiff knew that Defendants'
17 inadequate or failed treatment of his diabetes was resulting in a worsening of his
18 condition. While he had never suffered complications before being incarcerated, by 2001
19 Plaintiff was having diabetic comas, and the complications from lack of treatment
20 escalated to a point that Plaintiff was losing his eyesight, having trouble speaking, and
21 suffering the loss of a use of a hand. *Augustine* says that a failure to treat claim accrues
22 when the plaintiff discovers that the failure to treat "led to his deteriorating condition."
23 *Id.* at 1078. Thus, even applying *Augustine*'s more generous accrual standard, Plaintiff's §
24 1983 claims must be held to have accrued no later than July 7, 2004.¹⁰

25 ¹⁰ As the County noted, this case is much more akin to the facts of *Massey v.*
26 *United States*, 312 F.3d 272 (7th Cir. 2002), where the plaintiff brought an FTCA claim
27 based on the failure to operate on his pre-existing hernia in a more timely fashion. The
28 court held that plaintiff's claim accrued when he discovered his injury (which the court

1 Plaintiff argues, though, that his claim did not accrue until after he was released
 2 from custody and had consulted with a doctor in 2008.¹¹ (Doc. #54 at 2). Only then, says
 3 Plaintiff, was he aware of not only the injury and its cause, but also **the full extent** of the
 4 injury. That argument is inconsistent with *Augustine* and has been rejected. *See*
 5 *Alexopoulos v. Riles*, 784 F.3d 1408, 1411 (9th Cir. 1986) (§ 1983 will not be tolled until
 6 the full extent of damage has been suffered and is known); *see also Louisiana-Pacific*
 7 *Corp. v. Asarco Inc.*, 24 F.3d 1565, 1581 (9th Cir. 1994) (the full extent of damage or loss
 8 need not be known, so long as the claimant is aware of some injury). Therefore,
 9 regardless of whether this Court applies the *Kubrick* or *Augustine* standard of accrual,
 10 Plaintiff's § 1983 claims are untimely and should be dismissed.

11 **B. Plaintiff's negligence claim is also untimely and should be dismissed.**

12 Under A.R.S. § 12-821 Plaintiff's negligence claim accrued when he knew of his
 13 injury and the person/entity that caused it. As discussed above and in Defendants'
 14 original motion, the undisputed facts show Plaintiff knew of the deterioration of his
 15 diabetes, and believed it to be a consequence of Defendants' failure to treat, at least as
 16 early as July 7, 2004. This claim therefore accrued on that date, and had to be brought
 17 within one year, or by July 7, 2005. *See* A.R.S. § 12-821. This case was filed in 2009,
 18 and Plaintiff's negligence claim is therefore time-barred. *Id.* (claims not brought within
 19 one year of accrual are barred).

20 **B. Plaintiff's negligence claim is also barred by the failure to timely file a**
 21 **notice of claim.**

22 found was increased pain) and its probable cause (the delay in operating). *Massey*, 312
 23 F.3d at 277.

24 ¹¹ He says this is the first time he could secure "sufficient medical care," unrelated
 25 to Defendants, to know of his injury and its cause. Plaintiff neglects to tell the Court,
 26 however, that he was out-of-custody for approximately one year between intermittent
 27 periods of incarceration between April 2001 and his release from County custody in
 28 September of 2002. (Doc. #1 at ¶ 28-35). Nor does he mention that he was out of
 custody for a year straight between release from County facilities at the end of September
 2002, until being re-incarcerated in State facilities in September of 2003. (*Id.* at ¶ 33).
 Perhaps Plaintiff does not bring this to the Court's attention because he has no explanation
 as to why he could not, and did not, seek the independent advice he claims was pivotal to
 accrual during his claims much earlier than in 2008.

1 Plaintiff concedes he did not file a notice of claim within 180 days of accrual of his
 2 claims, as required by A.R.S. § 12-821.01(A). Given this concession, Plaintiff's state law
 3 claims are barred.

4 **1. Defendants have not waived *any* notice of claim-related defenses.**

5 In his Response, Plaintiff contends that Defendants waived the right to argue that
 6 Plaintiff should have filed his notice of claim directly with the Sheriff¹² and the individual
 7 members of the Board of Supervisors, but he does not contend that Defendants waived
 8 any other notice of claim-related defenses. (Doc. # 54 at 14). Out of an abundance of
 9 caution, Defendants note they properly pled the notice of claim defense twice in their
 10 Answer. In the first instance, Defendants alleged that "Plaintiff's Notice of Claim was
 11 untimely, *or otherwise met the* requirements of A.R.S. § 12-821.01." (Doc. # 32 at ¶ 12)
 12 (emphasis added). In the affirmative defense section, Defendants also alleged that
 13 "Plaintiff failed to timely and properly exhaust all administrative requirements and
 14 remedies, including, but not limited to, A.R.S. § 12-821.01(A)" (*Id.* at ¶ D).

15 This language satisfies the notice pleading requirement applicable to affirmative
 16 defenses, and also was sufficient to prevent surprise, which is the purpose underlying the
 17 requirement that an affirmative defense be specifically pled. *City of Phoenix v.*
 18 *Linsenmeyer*, 86 Ariz. 328, 333, 346 P.3d 140, 143 (1959). Plaintiff was on notice that
 19 Defendants were challenging his satisfaction of the requirements of the notice of claim
 20 statute and therefore had only to review the statute to surmise what deficiencies were, or
 21 could be, alleged. Defendants have therefore properly raised this defense.

22 **III. PLAINTIFF'S DISABILITY DISCRIMINATION CLAIM IS UNTIMELY, REGARDLESS OF**
THE STATUTE THE COURT APPLIES.

23 While Plaintiff may be correct that the limitations period for his claim pursuant to
 24 the Americans with Disabilities Act ("ADA") is found in A.R.S. § 41-1492, it is of little
 25 consequence. Plaintiff agrees that even applying A.R.S. § 41-1492, his ADA claim is
 26 subject to a two-year statute of limitations, unless there is an ongoing discriminatory

27 ¹² Defendants withdraw this claim, as Plaintiff correctly observes that service on
 28 the Sheriff's Office was sufficient.

1 public accommodation practice, in which case the claim accrues two years after the
 2 termination of such a practice. *See A.R.S. § 41-1492.08(C).*

3 In reviewing the allegations of the Complaint, Plaintiff alleges that Defendants
 4 discriminated against him by excluding him from or denying him the benefits of
 5 Defendants' services, programs, and activities. (Doc. #1 at ¶ 102). Plaintiff also alleges
 6 Defendants failed to accommodate his chronic disease and resulting disability.
 7 Ostensibly, the basis for Plaintiff's ADA claim is identical to his other claims – namely
 8 that Defendants failed to treat his diabetes through diet and medication. His ADA claim
 9 therefore presumably revolves around the allegation that he was excluded from the benefit
 10 of adequate medical care because of his disability. This claim accrued when Plaintiff
 11 knew, or should have, that he was being denied the benefits of proper treatment of his
 12 diabetes as a result of disability. Even under the most charitable accrual analysis,
 13 Plaintiff's ADA claim is time-barred.

14 Plaintiff struggles to save his untimely disability claim by pointing the Court to that
 15 portion of the statute that tolls accrual until the time when an alleged discriminatory
 16 practice was terminated. (Doc. #54 at 2). That argument fails here for at least two
 17 reasons. First, Plaintiff has not alleged any ongoing discriminatory practice related to his
 18 ADA claim. He alleges only that during the term of his 2001-02 incarceration in County
 19 facilities he was denied the benefits of County benefits, services and programs.
 20 Assuming, *arguendo*, Defendants engaged in discrimination in violation of the ADA
 21 during Plaintiff's incarceration, any such discrimination would have ended when Plaintiff
 22 was released from County custody at the end of his final thirty-day stint in custody in
 23 September 2002. (Doc. #1 at ¶¶ 34-35).

24 Second, the case Plaintiff cites in support of his claim that his ADA claim should
 25 be tolled because of ongoing discriminatory practices is distinguishable, and therefore
 26 inapplicable to this case. Plaintiff cites *Bodley v. Macayo Restaurants, L.L.C.*, 546
 27 F.Supp.2d 696, 700 (D. Ariz. 2008), in which the court held that the plaintiff's Title III
 28 accessibility claim was not time-barred because the barrier that plaintiff pointed to as

1 precluding his accessibility existed not only from the time plaintiff began going to the
2 restaurant, but still existed as of the time the court considered dispositive motions. In so
3 holding, the court rejected the notion that plaintiff's repeated encounter of the same
4 barriers in the restaurant over a course of twelve years worth of visits did not preclude his
5 accessibility claim, as the barrier still existed and therefore constituted an ongoing
6 discriminatory public accommodation practice of the sort that would toll accrual of his
7 claim under A.R.S. § 41-1492.08(C). *Bodley*, 546 F.Supp.2d at 700. The same cannot be
8 said for Plaintiff's ADA claim. The alleged failure to provide him the same medical care
9 and treatment as other inmates ended when he was released from custody, and therefore
10 his claim is not tolled. Consequently, it is barred by the statute of limitations, whether the
11 Court applies A.R.S. § 12-542 or § 41-1492.01(C).

12 **IV. MCSO IS NOT SUSCEPTIBLE TO SUIT IN ITS OWN NAME.**

13 Whether MCSO is a jural entity, and therefore a proper Defendant, is not a
14 personal jurisdiction issue. Rather, MCSO is only a proper Defendant if it enjoys a
15 separate and distinct legal existence. *Williams v. City of Mesa*, 2009 WL 2568640, *2 (D.
16 Ariz. 2009). An action can only be maintained against "jural entities," which are those
17 entities that may sue and be sued. *Morgan v. Arizona*, 2007 WL 2808477, *8 (D. Ariz.
18 2007) (citation omitted). Thus, county agencies that lack the power to sue and be sued are
19 not proper defendants to a lawsuit. *Gotbaum v. City of Phoenix*, 2008 WL 4628675, *7
20 (D. ARiz. 2008) (concluding the "Phoenix Police Department is a subpart of the City of
21 Phoenix, not a separate entity for the purposes of suit").

22 Whether an entity possesses the power to sue and be sued must be determined
23 under Arizona law. Rule 17(b), Fed. R. Civ. P., provides that "[a]ctions brought by or
24 against a county or unincorporated town shall be brought in its corporate name." As this
25 Court observed in *Williams, supra*, this Rule required the plaintiff to sue the City of Mesa,
26 and not its police department, since Arizona law only confers a right to sue and be sued on
27 municipal corporations – like the City of Mesa – and not its sub-entities – like the police
28 department. *Williams*, 2009 WL 256840, *2. The same holds true in this case, since

1 constitutionally and statutorily only Maricopa County enjoys the right to sue and be sued,
2 while MCSO does not. ARIZ. CONST. art. 14, § 1; *see also* A.R.S. §§ 11-201(A), 11-
3 202(A); 56 Am.Jur.2d Municipal Corporations § 787 (“Generally, the departments and
4 subordinate entities of municipalities, counties, and towns that are not separate legal
5 entities or bodies do not have the capacity to sue or be sued in the absence of specific
6 statutory authority.”).

7 Here, Plaintiff points to no statutory authority authorizing MCSO to sue or be sued
8 as a distinct legal entity under the circumstances presented by his lawsuit. Plaintiff’s cited
9 authority on this issue does not change the fact that MCSO is not subject to suit on
10 Plaintiff’s claims. For instance, Plaintiff cites a number of cases in which MCSO was a
11 plaintiff, and suggests, as a result, the MCSO must be subject to suit here. But in many of
12 those cases, MCSO is a party because the statutes implicated in those cases required the
13 Office to act or be named. *See, e.g., MCSO v. Maricopa County Employee Merit Sys.*
14 *Comm’n*, 211 Ariz. 219, 119 P.3d 1022 (2005) (in which MCSO properly appealed a
15 determination of the Merit Commission under A.R.S. § 11-356). Because there is no
16 statutory authority supporting naming MCSO as a distinct Defendant here, in its own
17 name, it should be dismissed from the action. *See, e.g., Jacobs v. Port Neches Police*
18 *Dep’t*, 915 F.Supp. 842, 844 (E.D. Tex.1996) (holding sheriff’s department was not a
19 proper party to the suit because the county had not expressly “grant[ed] the servient
20 agency with jural authority”); *Sullivan v. Chastain*, 2005 WL 354032, *2 (W.D. Tex.
21 2005) (dismissing a county constable office because “an entity without a separate jural
22 existence is not subject to suit”); *see also Del Tufo v. Township of Old Bridge*, 650 A.2d
23 1044, 1046 n.1 (N.J.Super.Ct.App.Div.1995) (“‘Old Bridge Township Police Department’
24 is probably not a jural entity and is therefore probably not subject to suit in its own
25 name.”).

26 **VII. CONCLUSION:**

27 Based on the foregoing arguments, Defendants MCSO and Sheriff Arpaio urge the
28 Court to grant their Motion for Judgment on the Pleadings.

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2 RESPECTFULLY SUBMITTED this 18th day of September, 2009.
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5 HARPER CHRISTIAN DICHTER GRAIF, P.C.
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8 By /s/ Erin E. Byrnes
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15 I hereby certify that on September 18, 2009, I electronically transmitted the
16 foregoing document to the Clerk's Office using the CM/ECF system for filing and
17 transmittal of Notice of Electronic filing to the following CM/ECF registrants:

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37 /s/ Amanda Ferguson
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